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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1375

TEXAS EASTERN TRANSMISSION CORPORATION,
Petitioner,

v.

FEDERAL POWER COMMISSION,
Respondent.

REPLY OF PETITIONER TEXAS EASTERN TRANSMISSION CORPORATION TO BRIEFS IN OPPOSITION

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Petitioner, Texas Eastern Transmission Corporation, submits this reply to the briefs filed by the Federal Power Commission, the Philadelphia Gas Works Division of UGI Corporation, and the Public Utilities Commission of the State of California in opposition to Texas Eastern's petition for a writ of certiorari to review the judgment entered on June 20, 1969 by the United States Court of Appeals for the Fifth Circuit.

1. The Commission recognizes "the novelty of its ruling" in this case and concedes that whether it may require Texas Eastern to flow through the subject refunds is a question "of general interest and importance" (Com. Br. 8, 14). California likewise contends that the principles established by the orders of the Commission and the decision below have widespread applicability, *i.e.*, will apply to all pipelines, not just to Texas Eastern (Calif. Br. 8-9). PGW alone argues that the "issues actually presented by this case are narrow, unique and non-recurring" (PGW Br. 11).

However, PGW's present position is one of convenience[1] rather than conviction, because in the court below it relied upon the "Wider Implications of the Present Proceeding," stating:[2]

> "However, the above discussion of background history reveals that the present case is an important, precedent-setting one in the whole area of producer regulation. The result reached in the present case will inevitably have an impact on large refund amounts to be generated by the future resolution of producer proceedings now pending before the Commission and in the courts, especially the major area rate proceedings."

2. While Texas Eastern disagrees with numerous arguments advanced by California, it is sufficient to note at this point that California admits the decision of the court below is in conflict with *Northern Natural Gas Co.* v. *FPC*, 215 F.2d 892 (8th Cir. 1954), and ". . . therefore submits that *Northern Natural* should not be followed" (Calif. Br. 14-15).[3] This admitted conflict between the Fifth Circuit[4] and the Eighth Circuit alone warrants the granting of certiorari. See Supreme Court Rule 19 1(b).

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[1] PGW is a division of UGI Corporation, a stockholder-owned utility, which will monetarily benefit if the Commission's orders are affirmed. In this connection Commission surveys showed that UGI retained more than 58% of Commission-ordered refunds during the period July 1961-July 1964 (R. 517-521).

[2] PGW's Brief in the Fifth Circuit at p. 8.

[3] In a footnote (p. 10, n. 4), the Commission does not deny that the Eighth Circuit's holding in *Northern Natural* is in conflict with the decision below but attempts to reconcile the two cases by drawing certain inferences from a stay order previously issued by the court, *i.e.*, that the refunds "would probably be too small to warrant court proceedings to determine entitlement" (Com. Br. 10, n. 4). Regardless of the accuracy of the inferences drawn by the Commission, the Eighth Circuit's decision disposed of refunds in excess of $7.6 million (215 F.2d at 902).

[4] For some unrevealed reason, the Fifth Circuit failed to discuss the *Northern Natural* case even though it was extensively briefed by the parties.

3. The Commission would have this Court believe that as a result of its orders the refunds at issue[4a] will be paid to "ultimate consumers." This is not true — and the Commission knows it. In this connection, the Commission states that it "remanded the case to its Examiner to consider certain further matters relating to the disposition of the refunds in favor of the ultimate consumer" (Com. Br. 5). However, the remand to the Examiner was for the limited purpose of determining the "appropriate allocation between refunds attributable to Texas Eastern's jurisdictional and non-jurisdictional sales" (R. 768). Since Texas Eastern's non-jurisdictional sales are *de minimis, i.e.,* less than one percent of the total (R. 756), the bulk of the refunds will be paid directly to Texas Eastern's customers without the Commission having taken steps to insure that any of the refunds will reach "ultimate consumers."

The Commission, on three occasions (Com. Br. 7, 8, 14), states that after the refunds are paid to such customers, state regulatory agencies *will have* jurisdiction to decide the ultimate disposition of the refunds involved. This assertion is without legal or factual foundation. As recognized by the Commission in the orders under review (R. 756-57), local regulatory bodies typically have no jurisdiction over direct industrial sales, and even where jurisdiction is exercised the decision boils down to whether the refunds attributable to industrial sales should be retained by the pipeline, the distribution company, or the industrial customer. In no event are such refunds paid to ultimate consumers. As to the balance of the subject refunds, there is absolutely no assurance that under state law local regulatory agencies would or could require the flow-through to

[4a] PGW (Br. 2) and California (Br. 9) erroneously assert that these refunds are the result of producer regulation (PGW Br. 2, 5). More than two-thirds of the refunds result from resolution by the Commission of rate design and rate of return issues in pipeline rate cases (R. 423).

ultimate consumers of refunds received by distribution-company customers if such refunds are not related to increased rates charged the ultimate consumers. See *Straube* v. *Bowling Green Gas Co.*, 227 S.W.2d 666, 671 (Sup. Ct. Mo. 1950).

The foregoing was well known to the Commission, for in its *Forty-Third Annual Report* (1963) to the Congress[5] the Commission stated (at p. 127):

> "NATURAL GAS RATE REFUND SURVEY
>
> "The Commission during the 1963 fiscal year completed the first phase of a survey to determine what happens to the natural gas rate refunds it has ordered interstate pipe line companies to make to their utility customers. The survey, the first of its kind ever undertaken, was designed to provide the FPC with information which would assist in the discharge of its statutory obligation to regulate the transportation and sale for resale of natural gas in interstate commerce in a manner consistent with the congressional intent of protecting the ultimate consumer.
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> • • •
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> "In summary, the first phase of the survey revealed that local gas distributors in 36 States and the District of Columbia received approximately $129.2 million; however, information was obtained on only $126.4 million. *Of this amount, ultimate consumers received $73.5 million or 58 per cent.* Seven States reported that more than 90 per cent of the refunds were passed along to consumers, while in two States the distributors re-

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[5] The Commission cites (Com. Br. 4, 14, n. 7) this *Forty-Third Annual Report* as evidencing how it only recently became aware of the problem of the retention of refunds by pipelines. Paradoxically, the Report evidences the problem of retention of refunds by distribution-company customers of such pipelines.

tained all the refunds they received. In three States the amounts refunded were less than 20 per cent.

> *"The principal reason given for the retention of refunds was that the increased charges from interstate pipelines had been absorbed by distributors and not passed along to the ultimate consumers in the first place."* [6]

Thus, the Commission's own survey reveals that a substantial portion of any refunds which Texas Eastern is required to flow through will not reach the ultimate consumer but will only unjustly enrich distribution companies such as UGI Corporation.[7]

This fact exposes the fundamental error in the Commission's claim that its decision "gave full consideration to relevant equitable principles and was fully consistent with this Court's decision in *Federal Power Commission* v. *Interstate Natural Gas Co.*, 336 U.S. 577" (Com. Br. 10). The Commission's attempt to embrace *Interstate* and the concept of equitable entitlement is somewhat suspect because in its orders the Commission expressly disavowed any intent

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[6] Emphasis supplied unless otherwise indicated.

[7] In the orders under review the Commission recognized the inequity of this situation, stating (R. 758):

> "One consequence of the existence of unregulated direct sales rates may be that pipeline customers of Texas Eastern — which, unlike Texas Eastern, did not incur any increased costs of their own — will be able to retain portions of the refunds flowed-through to them. If the determination of the appropriate ultimate recipient of the refunds depended upon the relative equities of the two pipelines, it might well be argued that Texas Eastern has a greater claim."

Although the same inequity prevails with respect to direct industrial sales by Texas Eastern's distribution-company customers, the Commission did not seek to take any curative action to insure the refunds will flow to the ultimate consumers or to determine the relative equities of Texas Eastern and its customers to those refunds which will not flow to the ultimate consumers.

to enforce either Texas Eastern's equitable rights or potential consumer rights to any of the refunds, stating (R. 759):

> "The uncertain nature of a pipeline-purchaser's obligations to flow-through refunds to a direct industrial purchaser, under a contract not subject to regulation, is no more basis for permitting Texas Eastern to retain that portion of the refunds than the possibility that local distributor-purchasers, subject to state regulatory authority, might be permitted to retain some or all of the refunds. *Unlike the courts operating pursuant to their equitable powers in cases like Interstate, supra, we have no authority to enforce potential consumer rights in either the direct sales or local distribution situation.*"

In any event, the majority and concurring opinions in *Interstate* reveal that the practical problem which concerned the Court was the fact that *distribution companies* might retain, as they had in the past, rate reduction refunds. Thus, in concurring in part and dissenting in part, Justice Black observed (336 U.S. at 600, n. 6):

> "It is interesting to note the unchallenged assertion in the Government brief that although in *Central States Co.* v. *Muscatine*, 324 U.S. 138, 'this Court required that the way be left open for the ultimate consumers to utilize the remedies, if any, provided by local law, no such proceeding has been brought.' The illusion that state relief is somehow available to the consumers here seems to persist despite the realities that consumers in the *Central States* case, similarly situated to the consumers here, have not received a dime from the 'available' state remedies."

4. Further, it is apparent that the Commission has misinterpreted the equitable distribution of refunds contemplated by *Interstate*. According to the Commission, this Court held in that case that "the intermediate pipeline companies which had paid the high [sic] rates might be

entitled to the fund if their own rates had been unreasonably low" (Com. Br. 11). This interpretation, which Texas Eastern suggests is improper,[8] results from the Commission's position in this case that Texas Eastern is not entitled to the subject refund because of the level of its past rates.[8a] The Commission's interpretation accentuates the conflict between the circuits, for in *State Corp. Comm'n of Kan.* v. *FPC*, 215 F.2d 176 (8th Cir. 1954), the court in reliance on *Interstate* rejected an attempt by a pipeline to claim refunds on the basis of the insufficiency of past rates, stating (215 F.2d at 184):

> "We conclude that to grant the leave to adduce evidence requested by Northern would amount in effect to the initiation of proceedings for recovery of *reparations* by Northern for past insufficiency of rates. *That such is manifestly the purpose of the desired comparison between the expected and the actual realized proceeds of the rates that were established.* That such recovery of reparation is not sanctioned by Section 19(b) and is contrary to well settled law. Interstate Natural Gas Company v. Federal Power Commission supra; Federal Power Commission v. Hope Natural Gas Co., supra."

Similarly, the Commission's action in depriving Texas Eastern of the subject refunds, either because it failed to show its past earnings were unreasonably low or because

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[8] As Justice Douglas noted, the intermediate pipelines "make *no* claim that their rates have been so low that they are entitled to these refunds as a matter of law" (336 U.S. at 582). Thus the issue was not before the Court and the statement in the next sentence that if the issue had been tendered, "the Court would need to resolve it," *Id.*, does not amount to a ruling or a hint as to how such issue might be resolved.

[8a] The Commission (Br. 9) and California (Br. 5) point out that staff evidence in the case indicated Texas Eastern earned a rate of return in excess of 6.25% during the years 1962-1964. Such rate of return is to be contrasted with recent Commission decisions allowing rates of return up to 7.5%. See *Algonquin Gas Trans. Co.*, Opinion No. 571 issued January 19, 1970, 43 FPC .....

its past earnings were too high,[9] violated the prohibition against reparations.

Finally, the Commission recognizes that in *Interstate* this Court held that pipeline companies were entitled to a return of payments made into the fund created by the stay order if they had passed on the rate reductions to their customers (336 U.S. at 582). The Commission argues that Texas Eastern's absorption of the supplier rate increases in this case is not equivalent to the rate reduction situation in *Interstate* because any "change in rates, up or down, exposes a pipeline company's revenue position to Commission analysis and evaluation" (Com. Br. 12). Texas Eastern finds this distinction devoid of any substantive merit, because the revenue position of a pipeline company is constantly exposed to investigation by the Commission under Section 5(a) of the Act. Thus, the essential fact is not whether Texas Eastern's revenue position was exposed to Commission analysis and evaluation at the time it absorbed the supplier rate increases, the disallowance of which resulted in the subject ~~revenues~~ refunds but whether Texas Eastern's customers are in the same position they would have occupied if no rate increases had been filed by Texas Eastern's suppliers. In summary, no matter how the Commission may attempt to disguise the fact, its disposition of the subject refunds cannot be reconciled with the equitable disposition of refunds prescribed by *Interstate*.

5. The threshold question raised by Texas Eastern's petition is whether Section 4(e) of the Natural Gas Act

[9] The Commisison vacillates as to the basis for its decision. At several places it refers to Staff evidence that Texas Eastern earned a rate of return in excess of 6.25% for the years 1962-1964. However, no evidence was presented as to Texas Eastern's earnings for the year 1961, as to which refunds were also applicable. Therefore, the Commission held that Texas Eastern had the burden of proving entitlement to the refunds by showing that its past earnings were unreasonably low. According to the Commission, this holding applied not only to 1961, for which there was no evidence as to the level of Texas Eastern's earnings, but also to the years 1962-1964 (Com. Br. 6, n. 3).

requires the Commission to order the portion of increased rates or charges found not justified paid to the one by whom and in whose behalf the increased rates were paid. The Commission attempts to answer this question by asserting that: "No requirement that the refunds be paid to immediate purchasers is imposed" (Com. Br. 8). However, this dogmatic statement merely begs the question. Section 4(e) by its terms directs the Commission to order a natural-gas company "to refund with interest" that portion of any rate increase found not justified. The plain or common meaning of the word "refund," as well as its legal meaning, is that of restitution, repayment or restoration, *i.e.*, a payment back to one who paid initially.[9a] Thus, when the Act directs the Commission "to refund with interest," it necessarily defines the intended recipient, *i.e.*, the one who paid. The Commission does not dispute this interpretation of the statutory language. Instead, it concluded — and the court below concurred — that the plain meaning of the word "refund" should be disregarded as "plainly inconsistent with the Act's overriding purpose of protecting the ultimate gas consumers" (Com. Br. 8-9). This is a legal conclusion on a question of first impression with far-reaching significance. It is the type of question which should be resolved by this Court.

Any doubt as to the plain meaning and legal effect of the word "refund" in Section 4(e) is removed by the accounting provision, which requires a supplier of natural gas that has increased its rates "to keep accurate accounts in detail of all amounts received by reason of such increase *specifying by whom and in whose behalf such amounts*

[9a] See WEBSTER'S NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE, 2d ed., unabridged (which was current in 1938 when the Natural Gas Act was passed); 3 BOUV. LAW DICTIONARY, 2856 (Rawles 3rd Rev. Ed.). See also *United States* v. *Wurts*, 303 U.S. 414 (1938); *State of Missouri ex rel Sidenfaden* v. *U. S. Fidelity & Guaranty Co.*, 193 F.2d 47, 57 (7th Cir. 1951).

were paid." The Commission summarily disregards the accounting provision on the ground that "it does not purport to specify who is ultimately entitled to the refunds" (Com. Br. 9). Noticeably, the Commission does not attempt to explain why the statute requires the keeping of detailed records "specifying by whom and in whose behalf" increased rates are paid if it is not intended that any refunds required as a result of the disallowance of such increased rates should be paid back to the one who had paid the increased rates. Certainly, the payment of refunds to the one who paid the underlying increased rates comports better with the language of Section 4(e) than does the alternative of permitting the payment of refunds to any party chosen by the Commission. If it had been intended that the Commission should have the right to select other recipients of refunds, the accounting requirement in Section 4(e) logically would have been extended to include them, or would not have required the keeping of detailed accounts of all increased amounts "specifying by whom and in whose behalf such amounts were paid." In short, the Commission cannot simply disregard the accounting provision of Section 4(e) in construing the scope and meaning of that statutory provision. See *FPC* v. *Sunray DX Oil Co.*, 391 U.S. 9, 23-24 (1968).

6. The Commission does not dispute the fact that certain of the refunds at issue are payable to Texas Eastern under the express terms and conditions of Commission approved contracts for the settlement of supplier rate increases absorbed by Texas Eastern (Pet. 22-24).[10] However, the Commission argues that its approval of the refund provisions of the settlement contracts was not binding be-

[10] In a footnote (Com. Br. 14, fn. 8) the Commission states that Texas Eastern apparently no longer challenges the holding below that Texas Eastern's 1961 settlement did not bar the Commission's flow-through order involved in this case. The Commission's assumption is incorrect. See Texas Eastern's Petition pp. 4-6.

cause the supplier rate increase *proceedings* "were concerned not with the beneficiaries of the refunds, but solely with the lawfulness of the rates there at issue" (Com. Br. 15). This is sheer sophistry.

In the first place, it makes no difference what issues were involved in the supplier rate increase *proceedings* which were settled. In settling any proceeding the parties are obviously free to *contract* with respect to issues outside of the proceeding. Having approved the settlement contracts of the parties providing for the payment of certain of the refunds at issue to Texas Eastern, the Commission is bound by such approval regardless of whether refunds were at issue in the supplier rate increase proceedings which were settled. The Commission admits that "settlements are binding on matters governed thereby" (Com. Br. 14). We submit that matters "governed" by the settlements involved here include all the agreements contained in the settlement contracts rather than the Commission's present day hindsight conception of the issues involved in the *proceedings* settled in 1961 and 1962.

Secondly, the "lawfulness" of rates cannot be settled or determined in a vacuum. Once rate increases filed under Section 4(e) of the Act have been determined to be unlawful, new rates must be established for each class of customers and provisions must be made for the accounting of the portion of the increases found not justified. These and a host of other matters were unanimously retained by the parties in the contracts settling the rate increases filed by Texas Eastern's suppliers which were approved by final Commission orders. Having approved such contracts in their entirety, the Commission should not now be heard to contend that it is free to reverse its approval of all of the agreements contained in the contracts save and except the naked agreement that the rate increases were unlawful. Rate

settlement contracts will indeed become a thing of the past if all provisions thereof are not binding upon the Commission as well as the parties.

CONCLUSION

For the additional reasons set forth herein, Texas Eastern submits that its petition for writ of certiorari should be granted.

Respectfully submitted,

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